

MBT7CORC

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 JONATHAN CORBETT,

4 Plaintiff,

5 v.

22 Civ. 5867 (LGS)

6 KATHLEEN HOCHUL, LETITIA  
7 JAMES, KEVIN BRUEN, ERIC  
8 ADAMS, KEECHANT SEWELL, and  
INSPECTOR HUGH BOGLE,

9 Defendants.

Remote Conference

10 -----x  
11 New York, N.Y.  
12 November 29, 2022  
2:30 p.m.

13 Before:

14 HON. LORNA G. SCHOFIELD,  
District Judge

15 APPEARANCES

16  
17 JONATHAN CORBETT  
Attorney for Plaintiff (pro se)

18  
19 NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL  
Attorney for Defendants Hochul, James, and Brown  
20 BY: TODD A. SPIEGELMAN

21 NEW YORK CITY LAW DEPARTMENT  
Attorney for Defendants Adams, Sewell, and Bogle  
22 BY: NICHOLAS R. CIAPPETTA

MBT7CORC

1 (Case called)

2 THE COURT: Hello, and thank you for convening.

3 We're here to discuss primarily one matter, which is  
4 the plaintiff's motion for a preliminary injunction. We also  
5 have the defendants' proposed motions to dismiss, and I will  
6 discuss that after we talk about the plaintiff's motion for  
7 injunctive relief.

8 I should start out by saying that I have reviewed your  
9 papers, and it's my hope to issue an oral ruling at the  
10 conclusion of our conference, but I did want to give both sides  
11 an opportunity to speak particularly to some of the more  
12 difficult issues.

13 So, Mr. Corbett, it's your motion. There are issues  
14 I'm particularly interested in, but if you would like to say a  
15 few words by way of introduction, I'll let you do that first.

16 MR. CORBETT: Good morning, your Honor.

17 I don't think I have too much to say as far as an  
18 introduction. I'm sure the Court has thoroughly reviewed the  
19 papers and understands my position, so I'll just be available  
20 for questions.

21 THE COURT: Okay. Well, let me start with a question,  
22 then.

23 So with respect to the social media and references  
24 requirements, I'm really focused on the standing issue. I am  
25 pretty persuaded that you don't have standing to raise those

MBT7CORC

1 issues, but I did want to give you a chance to address that if  
2 there's anything you would like to say. And I have read your  
3 papers on the subject, but that's my question and that's my  
4 first concern.

5 MR. CORBETT: Yes. I think it does make it tougher  
6 with the timing thing, candidly. I hear the government's  
7 arguments. The issue will certainly arise eventually whether  
8 it is on this application or on renewal. It's something that  
9 licensing officers may take into consideration on their own,  
10 even if state law doesn't require them to quite yet. I think  
11 it's a real issue. And whether it's going to be next month or  
12 two years from now, it's going to come up, it's going to be  
13 something that directly injures my interests. Immediacy is  
14 certainly much harder in this case, especially when they're not  
15 even processing applications at the moment.

16 THE COURT: I'm glad you have a realistic view of that  
17 issue. And I don't doubt that it might come up some time, but  
18 perhaps not in your case because a renewal application, of  
19 course, only follows an original license that you're seeking to  
20 renew, and we don't even have that yet.

21 So why don't we move on, then, if you don't mind, to  
22 the training requirement, which I think is much more of a  
23 question. I'd like to start with the standing issue, but let  
24 me ask the city defendants—so that's Mr. Spiegelman, I think.  
25 It's your position that the plaintiff doesn't have standing to

MBT7CORC

1 raise that issue. It seems to me that perhaps he does. So if  
2 you'd like to say anything on that subject, I'd be pleased to  
3 hear it. And again, I have read the papers.

4 MR. SPIEGELMAN: Judge, I should say I represent the  
5 state defendants, but we did argue that the plaintiff doesn't  
6 have standing on this issue. I just reiterate under binding  
7 law, including the Second Circuit's decision in *Libertarian*  
8 *Party*, the cognizable legal injury doesn't arise until the  
9 application has been denied, and Mr. Corbett's application has  
10 not been denied. So he may obtain standing at some point, but  
11 he doesn't have it yet. I think the point that there is --

12 THE COURT: If I could just interrupt for a second,  
13 what about futility? I take your point that the application  
14 hasn't been denied, but futility is a separate basis for  
15 standing.

16 MR. SPIEGELMAN: Well, yes. In the same case, the  
17 Second Circuit was clear that objection or antipathy to the law  
18 is not futility, and that is what we have here. Plaintiff  
19 Corbett thinks the laws unconstitutionally won't submit -- they  
20 won't participate in the training, but that's simply not  
21 enough. He still has to go through the training and be denied  
22 to have standing. In *Libertarian Party* there was no training  
23 requirement then, but there were other requirements that  
24 applicants had to pay fees and they had to submit affidavits  
25 for good moral character and proper cause. Even with all that,

MBT7CORC

1 they didn't have standing. Just the filling out of the  
2 application, the affidavit, the fees, that wasn't the injury;  
3 the injury was when there are denied, and so too here.

4 THE COURT: I understand your argument.

5 Mr. Ciappetta, apologies for my confusing who your  
6 clients were. Would you like to be heard on that issue?

7 MR. CIAPPETTA: Yes, just briefly.

8 I think we argued along the same lines. I will just  
9 add that the plaintiffs in his papers and his complaint  
10 explicitly said that the training is a waste of his time. And,  
11 to me, that doesn't establish futility. Whether or not he  
12 feels that the course is going to be beneficial to him or not,  
13 standing can't be based upon that. And I would submit that the  
14 training is useful. It's 16 hours, plus two as a practical  
15 component, and there's New York relevant laws. So even though  
16 he may be a licensee elsewhere, the training would be relevant,  
17 but that's going on to different issue for now.

18 THE COURT: Right. I mean, I think the point is not  
19 so much whether the training would be helpful, but the real  
20 question is whether it's futile and whether futility confers  
21 standing here. It's not just that he has antipathy towards the  
22 training requirement, but he refuses to do it. And it's not  
23 something that is in the control of some other person or that  
24 may change as circumstances in the world change, it's something  
25 he refuses to do.

MBT7CORC

1           So I guess my question is: Why doesn't that make the  
2 whole application process futile? I mean, why do I have to  
3 insist that his application be denied because he has refused to  
4 take the training before I hear this?

5           MR. CIAPPETTA: I think even if you look at the  
6 recently decided *Bruen* case, your Honor, in that case, you have  
7 an application and a denial. That denial, as Mr. Spiegelman  
8 said, is the quintessential hook for the standing. And in  
9 those cases, under that theory in the *Bruen* case, the person  
10 said, Well, I can't establish proper cause so I'm not even  
11 going to bother applying. And that wasn't -- I think the Court  
12 there would have said that there was a standing issue as well.

13           So we saw in that *Bruen* case you had an application,  
14 you had a denial, and that was the basis for the federal  
15 lawsuit. Here, we don't even have that. His application  
16 remains pending; there's no decision on it yet. And you could  
17 have that situation --

18           THE COURT: So here's a question.

19           MR. CIAPPETTA: Yes.

20           THE COURT: Is there any reason to think that he would  
21 be granted the license that the requirement for training can be  
22 waived or would be waived?

23           MR. CIAPPETTA: Not as of this moment.

24           And, your Honor, as you reviewed my papers, I did  
25 mention the fact that local licensing officers do have

MBT7CORC

1 discretion with respect to the training. They can evaluate  
2 going back five years to see whether other experience may have  
3 substituted for it. In reply, the plaintiff did say that he  
4 hasn't taken any training in the last five years, so I do  
5 acknowledge that that probably would mean that it couldn't be  
6 established elsewhere. Though, I do think that the department  
7 deserves a chance to look at the application.

8 But, certainly, there's a lot of situations with  
9 respect to training where people may have established that  
10 otherwise. So we wouldn't want them to say, Oh, it's futile, I  
11 don't think that I have the five years, the five-year look-back  
12 wouldn't help me. I think that's a decision for the department  
13 to make. The department should be able to review it and it  
14 shouldn't be based on whether the license applicant says, I  
15 can't meet it or not.

16 Here, it might be a clearer question based on his  
17 statement in his affidavit. But in a lot of circumstances, it  
18 might not be so clear. Also, if "I won't be able to be  
19 licensed" was the standard, I think there would be a whole host  
20 of other situations where people would be running to court  
21 without letting the NYPD process their applications. For  
22 example, they could say, Oh, I have a criminal conviction in my  
23 background, that means they'll deny me, I'm not going to even  
24 bother applying; or, I have an order of protection against me  
25 that most likely means I'll be denied, I won't apply. So I

MBT7CORC

1 think in those situations we'll have an efficiency of court  
2 issue.

3 THE COURT: A big difference is that the application  
4 has been filed here. I guess it depends on what the  
5 circumstances are, but if an application has been filed and in  
6 one of those other examples you gave and it's clear from the  
7 statute that the applicant hasn't met a requirement or  
8 condition for licensing, I think there's a fair question -- and  
9 maybe not even question, a fair conclusion about futility. But  
10 let's go on to the merits of the training requirement.

11 Mr. Corbett, I know that you're *pro se* here, but you  
12 are an attorney, but it's your license for a firearm that is at  
13 issue here. So with regard to the constitutionality of the  
14 training requirement, it's your position that it's not  
15 Constitutional and after the *Bruen* case it's clear that the  
16 inquiry here, the proper inquiry, is a historical one. And the  
17 question is whether historically comparable regulations or  
18 burdens were or have been imposed, and I didn't see any  
19 evidence attached to your motion on that issue, and so I was  
20 wondering what you have to say about that.

21 MR. CORBETT: Yes, your Honor.

22 On that issue, the burden is on the government to  
23 demonstrate that there is a historical analogue, not on the  
24 challenger. I think that we can easily see what the current  
25 state of the law is in all 50 states. I think that we can look



MBT7CORC

1 back over the last century—and this is not something that  
2 requires a ton of research—an 18-hour training course has  
3 never been required. The historical analogue that the  
4 government attempts to make is that of military service, trying  
5 to, again, bring back the word militia in the Second Amendment  
6 that has been resounding made a nullity by the Supreme Court at  
7 this point. One could own a firearm and not be eligible for  
8 the militia in the 1800s. There simply is no historical  
9 analogue that the government has pointed to. Given that it's  
10 not my burden, I think that the government clearly has not  
11 carried theirs.

12 THE COURT: Let me interrupt.

13 I agree with you that ultimately the government has  
14 the burden here of showing that there is a historical analogue,  
15 but on your motion for preliminary injunction you have the  
16 burden of showing a likelihood of success on the merits. So  
17 that means that if they present me with evidence, which they  
18 have, and you don't then you haven't carried your burden. And,  
19 frankly, even if I simply viewed it as their having the burden  
20 even on your motion, if they put in evidence and you don't put  
21 in evidence then they have carried their burden, unless I  
22 discredit all of their evidence. And I don't have any  
23 countervailing evidence to do that with.

24 MR. CORBETT: I think it's not so much discrediting  
25 their evidence as finding that it's not legally relevant. The

MBT7CORC

1 evidence that they submitted simply is not analogous to the  
2 current rules. Unless they've submitted evidence that is  
3 actually on point, they haven't submitted any evidence that is  
4 competent to carry their burden.

5 THE COURT: Well, I mean, by the terms itself in the  
6 Second Amendment, and even the discussion in the *Heller* case,  
7 isn't the right to bear arms sort of intimately related and  
8 derived from the whole concept of a militia, but broadly  
9 defined, as *Heller* does?

10 MR. CORBETT: There are many people who do believe  
11 that there is a connection between their right and militia  
12 membership. However, the Supreme Court has been clear that  
13 these are individual rights that we have that are unconnected  
14 with militia membership. So I don't think at this point, based  
15 on current Supreme Court law, that that argument can save the  
16 government's rule here.

17 THE COURT: Okay. Let me hear from one of the  
18 defendants. Why don't we start with Mr. Spiegelman again.

19 MR. SPIEGELMAN: I'd be happy to.

20 Your Honor cited *Heller* and the text in the Second  
21 Amendment itself, and *Heller* is clear that part of the Second  
22 Amendment right is the proper use of handguns. And even before  
23 we get to this historical analysis, the Supreme Court found  
24 "shall issue" licensing regimes would have training  
25 requirements to be presumptively Constitutional. And the

MBT7CORC

1 Concealed Carry Improvement Act transforms New York into a  
2 "shall issue" regime, especially on the training requirement.  
3 If the plaintiff -- if the applicant completes the 18 hours,  
4 the licensing officer will issue them a license and so this is  
5 now -- New York is now like 31 other states.

6 And I think if you look at the plaintiff's papers  
7 carefully, it doesn't actually contend that a training  
8 requirement in and of itself is unconstitutional, it's just the  
9 fees he speculates might be incurred or the 18 hours, but  
10 that's kind of a slender read to stand on. I mean, New York  
11 may be the highest, but it's not the highest by much, right?  
12 Illinois is at 16. New Mexico is at 15. Do the extra two  
13 hours make the whole requirement unconstitutional? No. If you  
14 take plaintiff's arguments to its natural conclusion, the  
15 highest state is always unconstitutional you just keep knocking  
16 down the hours, which doesn't make a whole lot of sense.

17 And the historical analogues are on point. I won't  
18 belabor what we say in our papers, but the militia training was  
19 much more extensive than 18 hours. This was training every  
20 year, six times a year, in some states, six hours a day until  
21 you were 45, not once every three years for 18 hours. And the  
22 overarching purpose was firearms safety, even for the militia.  
23 They don't want you shooting yourself with the gun. And, of  
24 course, the burden is much less here.

25 I think we're on firm ground with the training

MBT7CORC

1 requirement. Even the *Antonyuk* court, which looked at the law  
2 pretty skeptically, upheld the training requirement, didn't  
3 really say anything about the hours, just put that down as  
4 fine. And plaintiff's argument on the fees is based on  
5 speculation.

6 I guess the last thing I'd say about that is,  
7 historically, militia members incurred a lot of costs. They  
8 paid for their own equipment. They didn't get reimbursed for  
9 travel time and so on. So the fees, whatever they are, are not  
10 out of step, historically.

11 I think I'll leave it at that.

12 THE COURT: Okay. Thank you.

13 Mr. Ciappetta, would you like to be heard? And I'm  
14 particularly interested in the exorbitant fees argument that  
15 Mr. Corbett makes.

16 MR. CIAPPETTA: I'm sorry, your Honor. I had to  
17 unmute myself.

18 THE COURT: Okay.

19 MR. CIAPPETTA: Yes, I will address the fees.

20 First, I do want to talk about the *Bruen* test itself  
21 for a moment. I won't reiterate what the State said, but our  
22 analysis was slightly different, and it goes to your question  
23 on the burden.

24 While eventually the burden is to justify the  
25 regulation based on a tradition and establishing a tradition in

MBT7CORC

1 regulation, there's a first step in *Bruen*, and that shouldn't  
2 get lost here, and that's very important. The Court made very  
3 clear that there's a step-one analysis that needs to take  
4 place. And at that step one, you first have to determine  
5 whether the proposed conduct is even covered by the Second  
6 Amendment. That's significant. That's not something to just  
7 speed through as the plaintiff does.

8 In *Bruen*, I think the question is fairly easy so they  
9 didn't spend need to spend a ton of time and make decision on  
10 it, but it is analysis that needs to occur in every single  
11 case. And here, we argue that the proposed conduct is owning  
12 or possessing a firearm without obtaining training.

13 THE COURT: Well, wait. I mean, I understand that  
14 that's your argument. And the reason I didn't pursue it is  
15 because it seems to me that it begs the argument and it  
16 conflates the right to bear arms with any regulatory  
17 requirements that might be imposed on it. And so, I guess I  
18 have trouble accepting your argument.

19 MR. CIAPPETTA: Okay. But I would say then -- I mean,  
20 I assume the plaintiff is trying to propose that the proposed  
21 conduct is a right to carry. But I would suggest, your Honor,  
22 then, if that's the case, that would make the first step of the  
23 *Bruen* analysis virtually irrelevant, because at every single  
24 regulation that would be challenged in any regard somebody  
25 would say, Oh, my proposed conduct is the right to carry.

MBT7CORC

1           So, for example, if they challenge the NYPD licensing  
2           scheme in its entirety, you could say, Oh, that's my right to  
3           carry. I would suggest that there, it's the right to carry  
4           without a license; and here, it's the right to carry without  
5           undergoing any training. And we say that conduct isn't  
6           protected.

7           THE COURT: Is there any binding case law? I know  
8           it's hard since *Bruen* is so recent, but is there any binding  
9           case law or even persuasive case law that adopts your approach  
10          for defining step one?

11          MR. CIAPPETTA: Not in the Second Circuit, but there  
12          have been decisions in district courts elsewhere. I believe  
13          there's a couple decisions in Texas that spend a great deal of  
14          time. Even the decision that came out of Texas, your Honor,  
15          dealing with whether individuals 18 to 21 years of age have a  
16          right to carry. And in that case, and in also some of the  
17          cases challenging sections of United States Code as to whether  
18          a felon can carry or not, there's substantial analysis in those  
19          cases. In fact, I have one in front of me. I believe it's  
20          *United States v. Antonio Perez-Gallan*. And there, was  
21          whether -- if you were subject to a court order, whether that  
22          violates *Bruen*. And at each of these levels, they're  
23          conducting quite a bit of analysis at that first step. So I  
24          don't think it's just something that is always going to be the  
25          cause, or even in certainly this case, it's just the right to

MBT7CORC

1 possess gets you through the *Bruen* step one. I think it's much  
2 more complicated than that.

3 THE COURT: Okay. Did you want to say anything else  
4 about the constitutionality of the training requirement?

5 MR. CIAPPETTA: Yes.

6 Likewise, with respect to the training, whether you  
7 look at it in step one or in step two, I think the Supreme  
8 Court has already tacitly approved training. They mentioned in  
9 Footnote 9 of the *Bruen* decision that there are long-standing,  
10 presumptively lawful regulatory measures, and this seems to be  
11 one of them. They specifically talk about a training course.

12 THE COURT: I had a question about that because,  
13 frankly, it wasn't entirely clear to me from the *Bruen*  
14 decision. Where does that leave us with the historical  
15 analysis? I mean, they tell us the test is a historical  
16 analysis, but does that mean that they've implicitly done this  
17 historical analysis around training and come to that conclusion  
18 or what?

19 MR. CIAPPETTA: Yes, that's what I believe, your  
20 Honor. I believe that over the course of *Bruen* and over the  
21 course of *Heller* that the Supreme Court identified these  
22 long-standing, presumptively lawful regulatory measures, and  
23 they've already done that analysis for us. For example, also  
24 in the category of dangerous arms they did that analysis  
25 already and they already determined how, going forward, you

MBT7CORC

1 would look at a dangerous weapon; it would be whether -- you  
2 wouldn't need to do that historical analysis, they've already  
3 done it. For example, with respect to felons, with respect to  
4 the sensitive locations that they've identified—schools,  
5 courthouses—you wouldn't need to do those again. So if  
6 somebody challenges them, the Supreme Court has already done  
7 that analysis, correct.

8 So, for example, and as applicable to this case, these  
9 long-standing presumptively lawful regulatory measures, one of  
10 those is where there are narrow definite and objective  
11 standards. And this is certainly a narrow, definite, and  
12 objective standard. All you need to do, as Mr. Spiegelman  
13 said, is look and see whether the person has a certificate of  
14 completion for the training.

15 THE COURT: Again, I'm trying to understand this.

16 So narrow -- I don't remember the language -- certain  
17 and objective standards that -- not any narrow and objective  
18 standards I presume would survive, it also has to have a  
19 historical analogue, right?

20 MR. CIAPPETTA: I would argue no. If they're narrow  
21 and objective, I believe the Supreme Court has already upheld  
22 those presumptively.

23 THE COURT: Okay.

24 MR. CIAPPETTA: Particularly with respect to training  
25 and course work.



MBT7CORC

1 THE COURT: Okay. I mean, it seems to me you're  
2 suggesting an overly broad reading, but that is not relevant  
3 here since we're talking about training requirements. But,  
4 okay, go ahead.

5 MR. CIAPPETTA: So here, as I said, this is very  
6 objective, right? I mean, you either take the course and you  
7 get your certificate of completion or you don't.

8 Going back to your point -- which is a broader point,  
9 right? It really involved whether there's the exercise of  
10 discretion upon the licensing officer. And with respect to a  
11 training program, and this is a training requirement, there's  
12 no discretion that needs to be exercised if he sees the  
13 certificate, that's a checkmark, that application requirement  
14 has been completed.

15 THE COURT: So you're suggesting that any narrow  
16 requirement imposed on an applicant that is objective and not  
17 discretionary would survive?

18 MR. CIAPPETTA: Potentially. I mean, I don't think I  
19 need to make that argument in this particular case.

20 THE COURT: Right. Okay.

21 MR. CIAPPETTA: But in the appropriate case, I would  
22 certainly be willing to make that argument, and I believe it  
23 would be a colorable one.

24 THE COURT: Okay. You're right. It's completely  
25 academic here. So why don't we talk about some aspect that

MBT7CORC

1 isn't as academic. And I'm still interested in the fees  
2 argument.

3 MR. CIAPPETTA: Yes. I think that that's also  
4 speculative. The Supreme Court had some language in a footnote  
5 that talked about cost. I think that talks about numerical  
6 dollar cost, hard costs, not soft costs, which is the time  
7 involved to take a course, the number of hours in the course,  
8 because --

9 THE COURT: And what did we know about the standard of  
10 how much is too much?

11 MR. CIAPPETTA: That's a good question. We don't know  
12 that. And I do think that's something that that's going to  
13 have to be developed in case law. I do think that while  
14 perhaps it's a different standard for the Second Amendment,  
15 there is case law dealing with fees and other context, and  
16 we've litigated this in different aspects where the fee has to  
17 be proportionate to the amount of work done in connection with  
18 the application. So the administrative fee couldn't be  
19 \$10,000, for example, because there's not \$10,000 worth of work  
20 done to review the application.

21 Here, I think the fee is only \$350. I can tell you,  
22 certainly, that there's a tremendous amount of work that goes  
23 into the review of an application, and even more so since the  
24 CCIA was passed on September 1., because now you have a lot of  
25 different things to review that you didn't have to review

MBT7CORC

1 before.

2 THE COURT: Okay. Let me hear from Mr. Corbett.

3 Mr. Corbett, it's your motion, and I think you know  
4 the issues that I'm interested in. I'll let you have the last  
5 word if there's anything else you'd like to add, or anything  
6 that's been said that you want to address.

7 MR. CORBETT: Thank you, your Honor.

8 There is ambiguity in the *Bruen* case as to whether  
9 certain objective licensing measures need to pass a historical  
10 analogue or not. But to the extent that the Supreme Court  
11 implied some kind of exception, the exception was not just for  
12 any objective measures, but specifically for those that prevent  
13 dangerous or non-law abiding people with having guns. So  
14 essentially there's some kind of tailoring there, there's some  
15 kind of balancing test, if we're going to assume that there's  
16 no historical analogue required for those things.

17 THE COURT: I mean, but there is. There's a very  
18 strong historical analogue for dangerous or unsavory people  
19 possessing guns.

20 MR. CORBETT: Definitely.

21 The papers that I filed don't dispute that a training  
22 requirement of some kind is Constitutional or that fees of some  
23 kind are Constitutional; the question is whether or not they're  
24 excessive. And I think right now we have a few things that go  
25 towards it being excessive.

MBT7CORC

1           Number one, the total cost of licensure is going to be  
2 over \$1,000. The government can call that speculation, but  
3 they haven't put forth any speculation of their own or any  
4 evidence to disprove it. It seems pretty clear from any  
5 research that I've done and presented to the Court that it's  
6 going to be over \$1,000. It's also going to be dozens of  
7 hours.

8           THE COURT: Wait. Have you put any evidence that says  
9 that?

10          MR. CORBETT: Well, I put the actual costs that the  
11 government charges for their licensure. But the real issue is  
12 that the training courses are going to be substantial.

13          If we look at training courses in other states that  
14 are smaller in duration, you'll see that they run 5, 6, 7,  
15 \$800. There's no way in New York, one of the most expensive  
16 places in the country, we're going to escape anything like  
17 that. But even if it was just \$500 for the licensing course,  
18 that's in addition to the \$350 for the application, in addition  
19 to the \$88, or whatever it is, for the fingerprints, in  
20 addition to the time one has to take to complete all of these  
21 steps. So really, this does deny the ordinary citizen the  
22 ability to get this license without trading extreme hardship.

23          On the other hand, the government really hasn't  
24 demonstrated what good this course is going to do over shorter  
25 courses that are common in other states. It just doesn't seem

MBT7CORC

1 that there's any kind of justification other than an attempt to  
2 just make it more difficult.

3 THE COURT: But that doesn't make it unconstitutional.  
4 I guess, at what point do you say it reaches the level where it  
5 is so excessive that it's unconstitutional? What's the measure  
6 of that?

7 MR. CORBETT: It's going to be hard to put an exact  
8 number on that. And the Supreme Court has always been very  
9 good at putting these kind of vague standards and letting the  
10 district courts kind of figure it out. And it's unfortunate we  
11 have to do that now with very little guidance, however the  
12 licensing costs now will be the highest in the country, there's  
13 no doubt about that. The training number of hours will be the  
14 highest in the country, there's no doubt about that either. So  
15 if there is a training requirement that can be challenged in  
16 this country, it is New York's new requirement.

17 I wanted to add one more thing, just as a general  
18 outlook for this case. The government makes a lot of arguments  
19 that make sense. They're logical and, in a vacuum, they are  
20 persuasive. I would urge the Court to consider whether the  
21 Supreme Court, as it's currently made up, will consider them  
22 the same way.

23 The government's, for example, arguing that the  
24 burdened right is not just the right to bear arms, but the  
25 right to bear arms without a license and so forth. These are

MBT7CORC

1 questions that the Supreme Court would not even come close to  
2 agreeing with the government on. There is an argument that is  
3 made there, it is a logical argument, but it is an argument  
4 that is foreclosed by *Bruen*, and it is an argument that will go  
5 nowhere. The militia is not connected to this debate anymore.  
6 Comparing training requirements to militia training  
7 requirements is simply not a historical analogue that the  
8 Supreme Court will accept. And I would urge the Court to see  
9 it as that.

10 THE COURT: Okay. I am prepared to rule, in that  
11 case. Let me begin with the legal standard, which I know was a  
12 matter that the parties disputed.

13 I'm quoting now: "A party seeking to stay government  
14 action taken in the public interest pursuant to a statutory or  
15 regulatory scheme must establish (1) a likelihood of success on  
16 the merits, and (2) irreparable harm in the absence of an  
17 injunction." *Evergreen Association, Inc. v. City of New York*,  
18 740 F.3d 233 at 245, Second Circuit 2014; *accord Citizens*  
19 *United v. Schneiderman*, 115 F. Supp 3d 457 at 462, S.D.N.Y.  
20 2015. "A presumption of irreparable injury flows from a  
21 violation of Constitutional rights." *We The Patriots USA Inc.*  
22 *V. Hochul* 17 F.4th 266 at 294, Second Circuit 2021.

23 I know that this is a less demanding standard than at  
24 least what I believe the City advocated for, but I'm not sure  
25 that the mandatory injunction standard has been applied in this

MBT7CORC

1 context. And the quotation that I read from *Evergreen* is  
2 explicitly addressed to a party seeking to stay government  
3 action taken pursuant to a statutory or regulatory scheme. So  
4 for the purpose of my analysis here, I'm adopting the less  
5 demanding standard, meaning less demanding standard imposed on  
6 the plaintiff seeking relief.

7 So in terms of my analysis, just to cut to the chase,  
8 I'm denying the request for preliminary injunction. With  
9 respect to the social media and reference requirements,  
10 plaintiff has not established a likelihood of success on the  
11 matters, and, specifically, that is on the standing issue. In  
12 order to have standing to sue, a litigant must have suffered an  
13 injury in fact *Spokeo, Inc. v. Robins*, 578 U.S. 330 at 338,  
14 2016. "To establish injury in fact, a plaintiff must show that  
15 he or she suffered an invasion of a legally protected interest  
16 that is concrete and particularized in actual imminent, not  
17 conjectural or hypothetical." *Id.* at 339, accord *TransUnion,*  
18 *LLC. v. Ramirez*, 141 Supreme Court 2190 at 2200, and the year  
19 is 2021. "A concrete injury must be *de facto*; that is, it must  
20 actually exist; it must be real, and not abstract." *Spokeo*,  
21 578 U.S. at 340.

22 As I understand from our oral argument, I think  
23 Mr. Corbett is realistic about this argument and understands  
24 the impediment that the requirement of imminence imposes.  
25 Here, I find, for the purposes of this motion, that the

MBT7CORC

1 plaintiff lacks standing to challenge the social media and  
2 reference requirements because he applied for his license in  
3 April 2022, and the two requirements we're talking about did  
4 not apply to applications that were made before September 1,  
5 2022. So by the terms of the statute, those requirements don't  
6 apply to plaintiff, so he cannot show injury in fact from these  
7 requirements.

8 Plaintiff looks to the future and argues that these  
9 requirements would apply to any renewal application. I'm not  
10 persuaded by this argument. First, any renewal application is  
11 at least three years away, and that is not actual or imminent.  
12 Second, any renewal application is hypothetical because there  
13 is not yet any license to renew. So for that reason, I find  
14 that plaintiff has not established a likelihood of success on  
15 the two challenges, the social media requirement and the  
16 references requirement, because he lacks standing.

17 Let me turn then to the training requirement. I  
18 conclude that the plaintiff has not shown a likelihood of  
19 success on the merits of this challenge. I'm assuming without  
20 deciding that he is likely to be able to show that he has  
21 standing to challenge the training requirement. "In order to  
22 challenge the New York firearm licensing laws, a person must  
23 either have applied for and been denied a license or make a  
24 showing that his or her application would have been futile."  
25 *Libertarian Party of Erie County v. Cuomo*, 970 F.3d 106 at 116,



MBT7CORC

1 Second Circuit 2020, abrogated by *Bruen* on other grounds.

2 Plaintiff here has filed an application and the  
3 training requirement by its terms applies to his application.  
4 He has not taken the required training. He states that he has  
5 no intention of taking the required training and he hasn't had  
6 any training in the last five years. Nothing in the statute  
7 suggests that the training requirement can be waived or that  
8 it's discretionary. And so on these facts, it seems likely  
9 that the plaintiff can show that his application is futile and  
10 likely to be denied. It is sufficient to establish injury in  
11 fact and, therefore, standing.

12 Onto the merits of the training requirement, the  
13 plaintiff has not shown a likelihood of success in showing that  
14 the requirement is unconstitutional. "The Second and  
15 Fourteenth Amendments protect an individual right to keep and  
16 bear arms for self-defense." *New York State Rifle and Pistol*  
17 *Association, Inc. v. Bruen*, 2111 at 2125, and the year is 2022.

18 "When the Second Amendment's plain text covers an individual's  
19 conduct, the Constitution presumptively protects that conduct.  
20 The government must justify its regulation by demonstrating  
21 that it is consistent with the Nation's historical tradition of  
22 firearm regulation." *Id.* at 2129 and 30.

23 "This historical inquiry will often involve reasoning  
24 by analogy." *Id.* at 2132. "Analogical reasoning requires only  
25 that the government identify a well-established and

MBT7CORC

1 representative historical analogue, not a historical twin."

2 *Id.* at 2133. "Whether modern and historical regulations impose  
3 a comparable burden on the right of armed self-defense and  
4 whether that burden is comparably justified are central  
5 considerations when engaging in an analogical inquiry. *Id.*"

6 So as a threshold matter, I find, for the purposes of  
7 this motion, that the Second Amendment's plain text covers the  
8 conduct in question, that is to own and carry a handgun in  
9 public. However, plaintiff has failed to show a likelihood of  
10 success on the merits. Defendants ultimately have the burden  
11 of proof on this issue. And here, they have made a sufficient  
12 showing without any contrary evidence from plaintiff that the  
13 training requirement is consistent with the Nation's historical  
14 tradition of firearm regulation.

15 The State defendants attach and quote a New York law  
16 called an Act for Regulating the Militia of the State of New  
17 York, passed in 1780, which shows that the belonging to a  
18 militia was something that was required basically of every  
19 able-bodied man between the ages of 16 and 44, and that was the  
20 State militia. And those men were required to be enrolled and  
21 to bear arms and at least four times a year—by the way, I  
22 think it's four and not six—be "called out to be well and  
23 sufficiently exercised trained and disciplined for their  
24 instruction and improvement." That is at Docket 16-8 at page  
25 3.

MBT7CORC

1 State defendants also provided a similar New Jersey  
2 law which states, "That the militia, on the days of exercise,  
3 may be detained under arms on duty in the field any time not  
4 exceeding six hours." Based on these sources and evidence in  
5 the record, the training requirement appears to be consistent  
6 with, and even more lenient than, the training requirements of  
7 the 18th and 19th centuries. Although the plaintiff disputes  
8 that the militia is an appropriate analogue, it is in that  
9 context that the Second Amendment was adopted and, in that  
10 context, that men were expected and did carry arms.

11 The plaintiff identifies several ways in which the  
12 training requirement is different from its historical analogue.  
13 As I said, I think that argument is unpersuasive because  
14 defendants, as *Bruen* says, need not identify an historical  
15 twin. Plaintiff also argues that the training requirement is  
16 unconstitutional because of exorbitant fees and also an  
17 argument about excessive time, but the plaintiff has not  
18 offered any evidence of what the fees actually will be. And  
19 the New York State militia statute makes clear that individuals  
20 were required to soldier significant costs in connection with  
21 their bearing arms. So it seems to me there's ample historical  
22 precedent not only for the training requirement but imposing  
23 costs in connection with the bearing of arms and licensure on  
24 the applicants.

25 So for these reasons, because the plaintiff has not

MBT7CORC

1 established a likelihood of success on the merits of  
2 challenging the training requirement, I am denying the motion  
3 for preliminary injunction.

4 Mr. Corbett, I understood from your letter to the  
5 Court that you intend to appeal; is that right?

6 MR. CORBETT: Your Honor, as to the Court's holding on  
7 the training requirement, yes, that is a likely outcome.

8 THE COURT: Okay. So given that, I think your  
9 suggestion to wait on any motions to dismiss makes sense. And  
10 so I'm going to grant the plaintiff's application to stay any  
11 motions to dismiss pending appeal and resolution of the  
12 preliminary injunction order.

13 My plan is to issue a very brief written order  
14 basically referencing my reasoning here on the record. We have  
15 a court reporter. There will be a transcript. And I'm also  
16 going to stay discovery and any other proceedings until after  
17 the preliminary injunction motion or appeal is resolved.

18 Anything else we should be talking about, Mr. Corbett?

19 MR. CORBETT: Your Honor, I just wanted to give notice  
20 that there may be a motion to amend the complaint to include  
21 the time that it has taken to process this application. We're  
22 approaching the eight-month mark now. The City has shown no  
23 intention of rapidly processing my or any other application  
24 that's been submitted, which will become a new Constitutional  
25 issue. So I just wanted to put that out there. There will be

MBT7CORC

1 an interlocutory appeal, the Court will retain jurisdiction,  
2 and that motion for leave to amend may be pending.

3 THE COURT: Okay. Mr. Spiegelman, do you want to  
4 comment? Is there any opposition to the motion to amend or to  
5 the proposed timing of the motion to amend, which I presume is  
6 relatively soon?

7 MR. SPIEGELMAN: I think I need to see the motion to  
8 say what the -- and talk it over with my clients to say what  
9 the State defendants' position on it would be.

10 As to timing, I guess it's when plaintiff wants to  
11 file it.

12 THE COURT: All right. But do you agree that I would  
13 have jurisdiction to consider it and rule on that motion?

14 MR. SPIEGELMAN: I think you would.

15 THE COURT: I think you would, too, but I just wanted  
16 to make sure there's no objection that.

17 So, Mr. Ciappetta, what is the position of the City  
18 defendants as to any motion to amend? Or do you want to confer  
19 with your clients?

20 MR. CIAPPETTA: We would have to confer.

21 I guess I do have one question for the Court though.  
22 Assuming he makes that motion and it's granted, then would I  
23 assume our time to respond to that or move would likely be  
24 stayed as well?

25 THE COURT: Yes, that's true. And if I don't

MBT7CORC

1 explicitly say so then, just ask me in a letter and I'll  
2 endorse it to make that clear and on the record.

3 MR. CIAPPETTA: We likely wouldn't have an objection.  
4 I do need to speak with my client. We're fairly permissive on  
5 letting people amend their complaint, as long as it's not too  
6 long into the litigation or it wouldn't involve discovery. So  
7 my inclination would be not to oppose it.

8 THE COURT: Okay. So, Mr. Corbett, I have a  
9 requirement for premotion letters. What I suggest you do is  
10 make a premotion letter and just lay out your argument fully  
11 and attach the proposed amended complaint to your letter. And  
12 what I suggest you do is do a compare so that we can see the  
13 changes as compared to the original complaint, and then the  
14 defendants can respond, likewise, in a letter and either say  
15 that they don't oppose or put their arguments there. Then I'll  
16 just decide on the letters; I won't take full briefing. So if  
17 you would comply with my individual rules in that way, that  
18 would be great.

19 MR. CORBETT: Your Honor, if I may ask, you have  
20 separate rules for *pro se* litigants and non. I'm happy to  
21 follow the non-*pro se* litigant rules; is that acceptable?

22 THE COURT: That is preferable. Thank you for raising  
23 that.

24 Okay. I assume there's nothing else. So unless  
25 anyone speaks up quickly, we're adjourned.

MBT7CORC

Thank you. Have a good afternoon, gentlemen.

(Adjourned)